Chapman University School of Law

NEXUS

A Journal of Opinion

Spring 2001 Vol. 6, No. 1

LAW • POLITICS • ECONOMICS • MEDIA

Democracy in California

Sesquicentennial Reflections on Equality and Liberty in the Golden State

Californians and Their Constitution: Progressivism, Direct Democracy and the Administrative State

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> I am persuaded that the good sense of the people will always be found to be the best army. They may be led astray for a moment, but will soon correct themselves. The people are the only censors of their governors: and even their errors will tend to keep these to the true principles of the institution. To punish these errors too severely would be to suppress the only safeguard of the public liberty.
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> —Thomas Jefferson[1]

> A majority, held in restraint by constitutional checks, and limitations, and always changing easily, with deliberate changes of popular opinions and sentiments, is the only true sovereign of a free people.
>
> —Abraham Lincoln[2]

California's first constitution, adopted in 1849, was praised by a distinguished historian as

> one of the best, if not the very best, of all the thirty-one state constitutions that then existed. Though nearly every provision was copied from some other instrument, there was a rare choice and combination making altogether a compilation of organic principles clearly and tersely expressed and admirable for the wisdom with which they were selected.[3]

One could hardly claim that the current California Constitution, adopted in 1879, is either "clearly and tersely expressed," or a statement of "organic principles." In the sesquicentennial edition of the constitution published by the California Legislature, the text runs to more than 250 pages, and addresses so many policy issues that it resembles "the prolixity of a legal code" more than it does organic law.[4] Since 1879, the constitution has been amended nearly five hundred times, often haphazardly and improvidently. Yet, many of these amendments have proved beneficial, while others have simply been trivial. We find, for example, that the salary of public school teachers cannot be less than twenty-four hundred dollars[5] and that "[t]he people shall have the right to fish upon and from the public lands of the state,"[6] but not the right to hunt. And there is this helpful rule of construction: "[t]he

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provisions of this constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise."[7]

Tax policy, government spending, property assessments, school financing and expenditures, labor relations, usury and an host of other details are provisions that undoubtedly should be in a legal code rather than in California's fundamental law. And in a provision carried over from the Constitution of 1849, the people are not only guaranteed the right to pursue happiness, they are also guaranteed the right to obtain it as well.[8] This is no doubt an expression of the optimism of the Gold Rush days, when hopes of success were extravagant. One prominent commentator argues that "California never lost this symbolic connection with an intensified pursuit of human happiness. As a hope in defiance of facts, as a longing which could ennoble and encourage but which could also turn and devour itself, the symbolic value of California endured—a legacy of the Gold Rush."[9] It could also be added that it is this dream—the *guarantee* of human happiness—that fuels California's modern administrative state.

The framers of the 1849 Constitution followed the model of the Federal Convention for its ratification: they took seriously the social contract origins of constitutional government, and adhered with scrupulous precision to the precept that "[a]ll political power is inherent in the people [and that] Government is instituted for the protection, security, and benefit of the people; and they have the right to alter or reform the same, whenever the public good may require it."[10] The ratification of the constitution was nearly unanimous. Of the 12,875 votes cast on November 13, 1849, 12,064 voted in favor of the new constitution.[11] Admittedly, the pool of voters was small, but the near unanimity of the vote showed something of the common purpose and public spirit that animated Californians in 1849. By 1879, however, that common purpose had dissipated somewhat, as the cacophony of special interests began to displace the voice of the common good. Indeed, government itself had become a special interest and has remained so until the present day. As Theodore Hittell, an astute observer of California politics, remarked in 1897, "[t]here can be no doubt that the constitution of 1879 was framed and adopted at a very unfortunate time and under very unfavorable circumstances. The people were too angry and desperate to make a good constitution. Hittel maintains that "[r]ailroad and labor troubles made genuine deliberation impossible."[12] The main impetus for constitutional change, Hittel argues, was

> occasioned by abuses by legislatures and officers of their powers, so that it was thought necessary to confine and restrict them within narrow limits. But while some benefits have accrued as results of the new limitations, they have not been unmixed benefits. The difficulty was that they went too far. Almost as much was lost, by preventing, in this too-sweeping indiscriminate manner, action which might have been of benefit, as was gained by preventing action which would have been of injury. For instance, while it cannot be denied that great wrongs were committed under the old constitution by special legislation, at the same time special acts, which might be of great beneficence, cannot be passed now. The trouble was not so much the old constitution, as the legislators and officers whom the people saw fit to elect and entrust with authority of which they were not worthy.[13]

In contrast to the near unanimous ratification of the Constitution of 1849, the Constitution of 1879 was ratified by the comparatively small margin of 10,825 votes out of the 145,093 cast.[14] In 1879 the future of the California polity did not seem particularly bright.

Indeed, by the turn of the century it had become painfully evident that the California Constitution, even in its revised form, was inadequate to curb the power of special interests groups that sought to con-

vert California government into the instrument of their special pleadings. The most successful of these special interests was the Southern Pacific Railroad whose far-flung interests dominated the politics of the state. Indeed, one noted commentator expresses what seems to be a consensus among historians when he argues that "[t]o a degree perhaps unparalleled in the nation, the Southern Pacific and a web of associated economic interests ruled the state."[15] The California Progressives were largely successful in eliminating the dominance of the Southern Pacific Railroad by the constitutional reforms that they instituted in 1911. And it is these progressive reforms—initiative, referendum and recall—that fuel the most heated contemporary debates about the California Constitution.

These devices of direct democracy were designed to allow the people to take action in the face of government that was either unwilling or unable to serve the public interest. The people could, *sua sponte*, pass laws that the legislature was unwilling or incapable of passing and could defeat by referendum any legislation that was believed to have been improvidently passed. And any public officer who had violated his public trust could be recalled. Furthermore, whenever the people deemed the public good to require an alteration in the fundamental law of the constitution, they could do so by constitutional amendment initiative. The Progressive theory was that all governmental institutions will inevitably be captured by special interests, and thus will be incapable of serving the public good. The people, on the other hand, are incapable of betraying the public good because, by definition, the people can never be a special interest. The people are the natural representatives of the public good, and direct action on the part of the people is a necessary corrective for public corruption. The principal advocate for direct legislation in California, Dr. John Randolph Haynes, argued on the eve of the 1911 election that

> [b]ribery of the people's representatives by special interests is the great demoralizing factor in our unchecked representative system of government. The honest majority of the electorate [illegible] and desire good government. If you wish to have a truly representative government, and an honest and efficient one, give to the honest majority the power to directly legislate and to veto the acts of their representatives. It is much easier to bribe a few representatives than to bribe the majority of the many electors.[16]

Today's heirs of the Progressive tradition, the progressive or liberal constitutionalists, utterly reject this trust in the public spiritedness of the people. As one prominent critic remarks, "[d]irect legislation, the creation of progressives of another era, today poses more danger to social progress than the problems of governmental unresponsiveness."[17] Indeed, we are told that the devices of direct democracy instituted by Progressivism merely allow the public to express its hysteria and latent prejudices in unrestrained majoritarianism. The initiative, which was a Progressive reform to serve progressive ends, has become a means for self-interested and mean-spirited majorities to promote decidedly non-progressive ends. In other words, the mechanisms of Progressivism are being used to defeat the ends of Progressivism. We must, therefore, in the spirit of Progressivism itself, reject the means and preserve the ends.

Californians have used initiative and referendum to do battle with their government, mostly to resist Progressive reforms and to thwart what might be called "ideological liberalism." In the early years, these devices of direct democracy were used sparingly, but since the success of Proposition 13 in 1978, the people have learned the efficacy of direct democracy in combating the cutting edge liberalism that has infected California since the 1960s. As one prominent commentator correctly observes, "Proposition 13 prompted a seismic shift in the state's political center...."[18] The radical tax cuts mandated by Proposition 13

signaled the end of California's "communitarian ethos."[19] In the 1950s and 60s, "California seemed to be a national model of high civic investment and engagement." Proposition 13, however, destroyed this Progressive vision by making California "the lodestar of tax reduction and public disinvestment [in] the 1980s and 1990s."[20] Criticism of Proposition 13 has taken on a frantic quality; ideological liberals are never gracious in defeat. But California voters seem not to have forgotten that the "model of high civic investment" included a tax-funded self-esteem commission—a part of the "communitarian ethos" that sought to promote self-esteem among the elite class of new age-liberals who, no doubt, had to learn to overcome any misgivings they might harbor about their privileged status.[21]

A number of prominent legal scholars have criticized the progressive reforms on constitutional grounds. There is a growing body of scholarship, for example, that maintains that state initiative and referenda procedures are a violation of the Republican Guaranty Clause of the United States Constitution. Article IV, section 4 provides that "[t]he United States shall guarantee to every state in this Union a Republican Form of Government...." The Constitution does not, of course, define "republican government," although any thoughtful observer must be puzzled by the presence in the same article of the fugitive slave clause. Nevertheless, it is clear, say the critics, that the Framers rejected direct democracy in favor of republican government, and republican government requires representation rather than the direct intervention of the people. Insofar as initiatives and referenda are devices of direct democracy, they are said to violate the Guaranty Clause. The essential problem, according to these critics, is that republican government requires that all legislation must be the product of *deliberation*, and deliberation can only take place through representation. As one analyst has phrased it: "unlike the legislative process, the initiative is not deliberative. Ordinary citizens simply do not have the time or attention span to focus on complex political issues and their judgment is likely to be erratic and capricious, swayed by momentary passions and prejudices."[22] One particularly acerbic critic argues that because deliberation cannot be a part of direct democracy, "it is extremely difficult for policymaking by initiative to actually promote the general welfare. This is especially true if the people are not as well informed as the Progressives believed them to be. It follows that the failings of direct democracy in the end limit the government's ability to pursue the general welfare."[23] Thus, the concept of public deliberation was merely a Progressive delusion: the public is incapable of deliberation. Deliberation can take place only in representative bodies where opposing interests are debated and reconciled. The accommodation of minority interests, which is the hallmark of "legislative deliberation,"[24] is wholly absent from initiative lawmaking. Thus, direct initiatives are always at best only incomplete expressions of the public good, and at worst simply the aggrandizement of majority factions.

The critics of the direct initiative have assiduously cited James Madison as their authority. Madison distinguished between republics and pure democracies and (unlike the Constitution) Madison does give a tolerably clear definition of the republican form of government. In *The Federalist*, Madison wrote that "we may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure for a limited period, or during good behavior."[25] The critics of direct democracy point to this passage as proof that Madison—and by extension the Founders generally—argued that the republican form of government contemplated by the Guaranty Clause was predicated upon "*the total exclusion of the people in their collective capacity.*"[26] A republic was essentially dif-

ferent from a "pure democracy," which Madison described as "a society consisting of a small number of citizens, who assemble and administer the government in person." A pure democracy, Madison concludes, "can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole...and there is nothing to check the inducements to sacrifice the weaker party."[27] A republican government, on the other hand, by employing representation—"this great mechanical power in government"[28]—can be extended over a large area and embrace greater diversity. Greater diversity will mitigate the possibility of majority faction and allow representatives "to refine and enlarge the public views." Madison concludes that "it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves."[29] The whole object of government, according to Madison, is to elevate reason over passion in public discourse: "it is the reason, alone, of the public," Madison wrote, "that ought to controul and regulate the government. The passions ought to be controuled and regulated by government."[30] This seems to be the gravamen of the complaints against the initiative—the public is incapable of deliberation and uses the devices of direct democracy solely to indulge its passions and express its hysterical prejudices.

Madison, of course, did not believe that representation by itself was a sufficient remedy for "the diseases most incident to republican government."[31] Indeed, "experience has taught mankind the necessity of auxiliary precautions."[32] Primary among these precautions was the separation of powers, which was devised not only to prevent tyrannical government, but to promote good government as well. The different branches of government would not only check one another in the service of the public good, but would also exhibit necessary functional expertise. The legislative branch—because it was more numerous and represented a greater variety of interest—would be suited to deliberation; the unitary executive to the execution of the laws, and the insulated Supreme Court to judgment.[33] The Senate in particular was to represent the "cool and deliberate sense of the community" against those "particular moments in public affairs when the people, stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for measures which they themselves will afterwards be the most ready to lament and condemn."[34] Madison does not, however, address the situation where government—the legislative branch in particular—refuses to acquiesce in, or act upon, the "cool and deliberate sense of the community" or where the legislature refuses to act in the public interest. The people can, of course, turn the malefactors out of office in the next election, or they may "alter or abolish" government itself. Direct action may be taken to amend or replace the Constitution by convention; or in the extreme resort, the people may have recourse to the right of revolution. In some sense, the initiative and referendum seems to occupy a kind of middle ground. It allows the people to take direct action without having to resort to more drastic expressions of sovereignty.

Where, then, does the issue of direct democracy stand with regard to the Guarantee Clause? While the Guaranty Clause did not generate significant debate during the Constitutional Convention, the leading scholar on the subject, William Wiecek, concludes that "it was designed to prohibit monarchical or aristocratic institutions in the states."[35] Of course, not all the states had republican governments at the time of the founding, if republicanism is understood as government based on the consent of the governed. According to this definition, and it is surely the one accepted by the founders, *none* of the slave states qualified as republican.[36] The slave states had representative government, but not all representative governments are properly re-

publican governments. It is the ends, not the means, that must decide the question of republicanism. But according to Wiecek, the Guaranty Clause had a prospective element as well, as it

> was not meant to solidify republican government in the mold of existing political institutions.... What began simply as a revulsion, grounded in experience and necessity, against rule by kings became transformed into a pledge of popular government. In its positive aspects the clause assured that innovation would be possible within a republican framework. It was more than the Philadelphia Conventions benediction on the extant state constitutions; it looked to the future, insuring that state governments would remain responsive to popular will.[37]

Thus it is highly unlikely that the framers would have considered the existence of initiative and referendum in state constitutions as evidence of non-republicanism, even if (as is likely) they might have believed that such devices of direct democracy were *unwise*.

Madison certainly believed that the danger of majority faction was greater in the states than in an extended republic. In *The Federalist*, Madison reported the widespread complaints "from our most considerate and virtuous citizens that the state governments are too unstable, that the public good is disregarded in the conflicts of rival parties, and that measures are too often decided, not according tot he rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority."[38] One can readily see that these are almost the precise words used by contemporary critics of initiative and referendum. Madison, of course, believed that an extensive republic would be the primary means of preventing the formation of majority faction. The smaller the society, Madison argued

> the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression. Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with each other.[39]

Madison apparently believed that the size and population of the United States brought together in a federal republic would supply the requisite diversity to militate against the formation of majority factions. Today, California not only has more than ten times the population the United States had in 1790, but the population represents greater diversity of interests. Surely, the idea that direct democracy can produce only majority factions under these circumstances is hardly credible—but this is the main complaint of the critics of direct democracy.

Several commentators have argued that initiative and referendum establish a plebiscitary rather than a republican form of government. In the eyes of one State Supreme Court justice, initiatives merely "force a plebiscite on measures of popular passion or self-interest."[40] According to one of California's most astute political observers, after the passage of Proposition 13, "real policy decisions are now being made in the plebiscitary process, and not in the halls of the legislature or the office of the governor, much less at the school board or the city council."[41] Every reader of Aristotle's *Politics* knows that this greater classifier of regimes regarded plebiscitary democracy as one of the worst regimes—if indeed it was a regime at all. As everyone seems to recognize, the initiative in California was originally designed "to provide

a check on elected officials.... Has
replace[d] representative government
together?[42]

The initiative in California, of course, exists within a constitutional scheme and is subject to constitutional limits. It is therefore not a plebiscitary system lacking constitutional limits. Although the California Constitution itself may be amended by the initiative process, this procedure cannot be used to revise the constitution, nor can any amendment of the California Constitution violate the Federal Constitution. And all statutory initiatives must conform both to the California Constitution and the Federal Constitution. The U. S. Supreme Court recently invalidated Proposition 198, a statutory initiative passed by the voters in 1996 to establish blanket primaries. The High Court ruled the blanket primary to be a violation of the First Amendment because it represented "a substantial intrusion into the associational freedom" of California's political parties.[43]

California courts have always been deferential in their review of initiatives. In *Amador Valley Joint Union High School District v. Board of Equalization*,[44] the case that upheld the Proposition 13 constitutional amendment initiative, the court remarked that "[i]t is a fundamental precept of our law that, although the legislative power under our constitutional framework is firmly vested in the Legislature, the people reserve to themselves the powers of initiative and referendum. It follows from this that, [the] power of initiative must be liberally construed...to promote the democratic process."[45] This deference, however, has not deterred California courts from invalidating, either wholly or in part, nearly one-half of all initiatives passed.[46] California courts have also not been unwilling to invalidate signature-qualified initiatives on constitutional grounds before they have appeared on the ballot.[47] This high rate of invalidation, coupled with federal constraints, and the fact that only about one-third of initiatives placed on the ballot are successful, hardly indicates a non-republi-

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mined by the political branches of gov
ment rather than the judiciary.[48] Nevertheless, some opponents of direct democracy take hope in the fact the Supreme Court in its decisions in *Baker v. Carr*[49] and *Reynolds v. Sims*[50] may have evidenced a willingness to narrow the scope of its political questions doctrine.[51] Yet as most observers seem to recognize, the prospects here are uncertain at best. Others, like Oregon Supreme Court Justice Hans Linde, argue that state courts should independently fill the political questions void left by the U.S. Supreme Court. Indeed, Linde argues that it is "beyond dispute" that the United States Constitution imposes "the most fundamental duty in American public law" on state courts and other state officials "to maintain republican forms of government."[52] State court judges, Linde points out, are bound, no less than federal judges, to uphold the United States Constitution. It is Justice Linde's opinion that "republican government, to the generation that designed and ratified the United States Constitution, meant representative government chosen by, and accountable to, the people."[53] Republican government is thus of the people and for the people, but not by the people. It should not be a government by the people for the simple reason that government by the people is government by collective passion rather than deliberative reasoning.

Justice Linde issues a plea for state constitutional amendments that would force important issues into the "normal legislative process." This will not be an unwelcome change because "voters...have had enough of divisive, emotional initiative campaigns driven by ideological, sectarian, or racial passions."[54] Linde has even devel-

oped a five-part typology of the kind of initiatives that state courts should disqualify under the Guaranty Clause: (1) any initiative that appeals to "collective passions" by referring to any group in pejorative or stigmatizing terms; (2) initiatives that avoid such terms but are clearly directed against "identifiable racial, ethnic, linguistic, religious, or other social groups;" (3) initiatives that do not name a specific group but in which "the historical and political context" makes it clear to judges and the public that a specific group is nevertheless targeted; (4) "initiatives which appeal to majority emotions to impose values that offend the conscience of other groups in the community without being directed against those groups;" examples here are attempts to restrict the teaching of evolution, to establish moments of silence in schools, enacting the death penalty, anti-abortion laws and parental consent laws; (5) initiatives placing affirmative legislation into the constitution weakening the power of legislatures or courts.[55]

This is probably the most massive prescription for state court activism that has ever been proposed—all under the guise of enforcing the Guaranty Clause of the Federal Constitution. With the possible exception of the Equal Protection Clause of the Fourteenth Amendment, no clause of the Constitution has been freighted with greater significance for the cause of ideological liberalism. And no clause, it seems, is less suited to carry such weight. Indeed, Judge Linde's impassioned plea passes the bounds of all reason—it surely reminds Californians of the era of the Bird Court and its ideological activism. Needless to say, Judge Linde is not defending republican government; he has, in fact, written an undisguised brief for judicial oligarchy in which the moving principle of republican government—the consent of the governed—has disappeared completely.

It is probably true that "California puts the fewest restrictions of all states on what can be decided by the initiative, and as a consequence, Californians use the initiative constitutional amendment process often and in many varied ways."[56] At the same time, however, most amendments to the California Constitution originate in the legislature (although there has been an upsurge of initiative constitutional amendments since the 1960s). A legislative constitutional amendment requires a two-thirds majority in both houses of the legislature, and approval by a majority vote of the people. Legislative constitutional amendments have a much greater likelihood of passing than initiative constitutional amendments.[57] The people of California seem quite willing to defer to the "deliberative process" when they have evidence that deliberation has actually taken place. It should be clear even to the meanest observer, however, that the deliberative process doesn't always result in genuine deliberation. What passes for "deliberation" is all too often the result of interest group brokering that ignores the common good.[58] In California, racial, sex and ethnic preferences in public contracting and university admissions provide a case in point. But this interest-group brokering, as we will see, is *praised* by many critics of direct democracy as evidence of deliberation.

It is true, as critics never tire of pointing out, that the initiative process as a whole is unrestrained, and perhaps even provides access to moneyed interests that would otherwise be unavailable. One commentator points to what he calls the "sad irony of California politics. Reforms by the Progressives...meant to disenfranchise the corrupt power of the political machines, have been captured, and, in turn, corrupted by the modern political machines. The reason modern economic powers have been able to turn the process of direct democracy against the general welfare" is a direct result of "tragic errors in the reasoning of the Progressives." The principal error

> is that the current initiative system allows special interests to set the popular agenda by proposing statutory and constitutional initiatives directly to the

> people. There is no limit to the power of these agenda-setting interest groups, nor is there a check on the authority of the people to change the constitution.[59]

It is simply hyperbole, of course, to suggest that there is no check on the power of the people to change the constitution. As we have already seen, there are federal constitutional limits as well as restraints in the California Constitution.

It is true that initiatives are often poorly written and deceptive, of dubious constitutionality and many of them impose unreasonable restrictions on policymaking. What is more, the grassroots element of the initiative—the core of the Progressive idea—has almost disappeared. Some professional signature gatherers boast that with enough money any proposal can be qualified because "[v]oters frequently sign initiative petitions without knowing anything about the contents." The "signature-collection industry"—so it is alleged—can place virtually any initiative on the ballot.[60] But it is also true that most initiatives are rejected in popular elections and where the voters are uncertain they tend to indulge a healthy skepticism. Two perceptive commentators note that

> [t]he election process itself provides the greatest safeguard against poorly drafted initiatives: through the course of a campaign, debate usually points out and even exaggerates flaws in initiatives, and voters tend to react accordingly. Voters tend to be very cautious and thus are reluctant to approve initiatives at the ballot box. Historically, California's initiatives average a one-third approval rate. This reluctance dramatically increases when voters are uncertain about a measure. When uncertain, the voter generally casts a vote against an initiative in order to maintain the existing public order.[61]

Many of California's most hotly contested initiatives in the last twenty-five years have been attempts to reign in an activist judiciary. Throughout the 70s and 80s, the California Supreme Court used the doctrine of independent state grounds as one of the principal weapons in its activist arsenal. This allows state courts to interpret the same or similar language in state constitutions independently of the U.S. Supreme Court's interpretation of the Federal Constitution. The one restriction is that the interpretation of the same or similar language cannot create *lower* standards of protection than is created by the Federal Constitution, but it can create *higher* standards. "Independent state grounds" is something of a misnomer because state courts are not entirely independent in the interpretation of state constitutions—rights can be interpreted only more expansively, and state protections can never fall beneath the federal minimum.

Joseph Grodin, a former member of the California Supreme Court who was turned out of office along with Chief Justice Bird and Justice Cruz Reynoso in the hotly contested judicial confirmation election of 1986, has recently written that "[i]t is, indeed, the rights-protecting provisions of state constitutions that have been the principal focus of the relatively recent revival in state constitutionalism. That this revival occurred at a time when the justices of the Warren Court were being replaced by justices who were more conservative in their approach, and as a consequence protection for individual rights under the Federal Constitution was on the wane, is surely no coincidence."[62] Grodin pointed to Justice William Brennan as the intellectual progenitor of this movement to state constitutions and independent state grounds.

In a 1986 article, Brennan noted that the incorporation of the provisions of the Bill Rights through the fourteenth amendment's due process clause "created a federal floor of protection that allow[s] diversity only above and beyond this federal constitutional floor."[63] Whenever the U.S. Supreme Court refused to extend the federal floor as far and as fast as Brennan

desired, he was quick to advise the states how they might evade the Supreme Court's rulings by invoking independent state grounds. In a dissenting opinion in the 1975 case of *Michigan v. Mosley*,[64] Brennan severely criticized the majority opinion's "erosion of *Miranda* standards as a matter of Federal Constitutional law and pointed out that no state is precluded by the decision from adhering to higher standards under state law." And in a call to arms Brennan urged the states to protect those constitutional rights that were being abandoned by the Supreme Court: "Understandably, state courts and legislatures are, as matters of state law, increasingly according protections once provided as federal rights but now increasingly depreciated by decisions of this Court."[65] With the advent of the Burger Court, Justice Brennan feared that liberal judicial activism would have to retreat to State courts and await a more propitious political climate.

One who responded to Brennan's clarion call was the late Justice Stanley Mosk, a long time member of the California Supreme Court who miraculously survived the 1986 judicial confirmation election that turned his three liberal colleagues out of office. Mosk wrote that state constitutionalism was necessary "to complete the work of the Warren Court...on...the state level." In Justice Mosk's view, "State courts faced a choice. They could retreat to pre-1953 apathy, or they could employ their state constitutions to maintain decisional consistency with the Warren Court."[66]

Various initiatives have tried to curb the use of independent state grounds. Article I, section 24 of the California Constitution, added in 1974, supports the use of independent state grounds: "Rights guaranteed by this constitution are not dependent on those guaranteed by the United States Constitution." Over the years, the California Supreme Court has said that this provision allows but *does not mandate* the use of independent state grounds. Decisions of the United States Supreme Court, the California Supreme Court acknowledged, "are entitled to respectful consideration and ought to be followed unless persuasive reasons are presented for taking a different course."[67] The most interesting battles have been fought in the area of criminal procedures and the rights of criminal defendants. One initiative, passed in 1972, added Article I, section 27 to the California Constitution and required the California Supreme Court to accept federal standards for cruel and unusual punishment in capital cases; another, Proposition 8, the Victims' Bill of Rights, passed in 1980, mandated that the exclusion of evidence proceed on federal grounds rather than independent state grounds. Both of these initiatives were designed to curtail the Court's expansion of the rights of criminal defendants under the aegis of independent state grounds, and both of these restrictions on judicial authority were subsequently upheld by the California Supreme Court.

In 1972, in *People v. Anderson*,[68] the California Supreme Court had declared the death penalty unconstitutional on independent state grounds. In a decision that must have pleased Justice Linde, the California Supreme Court declared that the death penalty was "unnecessary to any legitimate goal of the state and incompatible with the dignity of man and the judicial process."[69] A constitutional amendment initiative in 1972 overturned the *Andersen* decision. The initiative itself was subsequently upheld in *People v. Frierson*.[70] As the court tendentiously noted, "[s]ince 1972 the sovereign people of this state twice directly, and through their elected representatives on other occasions, have mounted a continuous, strong, and joint effort to restore the death penalty as a permissible form of punishment."[71] The court—with some reluctance—concluded that "[t]he clear intent of the electorate in adopting section 27 was to circumvent Anderson by restoring the death penalty *to the extent permitted by the Federal Constitution.*"[72] "The decisions of the people...may or may not have been wise," the Court lamented, "but we think there can be no reasonable doubt as to their

n or purpose."[73] The Victims' Bill
:s was upheld in *In re Lance W.*[74]
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ple of California passed another
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tion 115. The main purpose of this
was to withdraw independent state
powers from the California courts
st *all* areas touching upon the rights
nal defendants. The following lan-
/as added to Article I, section 24 of
te Constitution, following the Dec-
ı of Rights Initiative:

riminal cases the rights of a defen-
t to equal protection of the laws, to
process of law, to the assistance of
ısel, to be personally present with
ısel, to a speedy and public trial,
)mpel the attendance of witnesses,
onfront the witnesses against him
ıer, to be free from unreasonable
·ches and seizures, to privacy, to not
:ompelled to be a witness against
ıself or herself, to not be twice
:ed in jeopardy for the same offense,
to not suffer the imposition of cruel
ınusual punishment, shall be con-
ıed by the courts of this State in a
ınner consistent with the Constitu-
ı of the United States....

e people had thrown down the gaunt-
he post-Bird Court. The California
ne Court took up the challenge and
:ly declared the most radical provi-
f Proposition 115 unconstitutional.[75]
e California Constitution distin-
s between a revision and an amend-
Voters may *amend* the constitution
iative but a *revision* must take place
)nvention called by the legislature.
:ver a putative *amendment* is so far
ıg as to amount to a *revision*, the Su-
Court will declare it unconstitu-
In *Raven v. Deukmejian*, the Court
that as a result of the restrictions imposed on the courts by Proposition 115, "California courts in criminal cases would no longer have authority to interpret the state constitution in a manner more protective of defendants' rights than extended by the Federal Constitution, as construed by the United States Supreme Court."[76] This, the Court noted, "would substantially alter the substance and integrity of the state constitution as a document of independent force and effect." Thus, Proposition 115 "not only unduly restricts judicial power, but it does so in a way which severely limits the independent force and effect of the California Constitution.... [I]t is one thing voluntarily to defer to high court decisions, but quite another to *mandate* the state courts' blind obedience thereto, despite 'cogent reasons,' 'independent state interests,' or 'strong countervailing circumstances' that might lead our courts to construe similar state constitutional language differently from the federal approach."[77] Since, in the Court's opinion, Proposition 115 "substantially alters the preexisting constitutional scheme or framework" it clearly amounts to a revision of the California Constitution and is therefore invalid.[78] Curiously enough, however, the opinion reaffirmed its holdings in *Frierson* and *Lance*. Both of these decisions, according to the *Raven* court, involved "only isolated provisions and did not seek far-reaching, fundamental changes in our governmental plan. But neither case involved a broad attack on state court authority to exercise independent judgment in construing a wide spectrum of important rights under the state constitution."[79]

Less than a year after the decision in *Raven*, the California Supreme Court heard a similar challenge to Proposition 140, the term limits initiative passed in 1990.[80] One commentator has opined that terms limits can be "classified as a near-perfect example of populist reform—a change in the governmental process that legislatures are unlikely to impose on themselves."[81] Clearly, Proposition 140 was aimed at Willie Brown, the long-term speaker of the Assembly, and

his cohorts, who dominated the legislature in a manner that was surely reminiscent (if it did not surpass) the control exercised in previous years by the Southern Pacific Railroad.[82] Yet the Court in *Legislature of the State of California v. Eu* refused to countenance the argument that term limits was such a fundamental change in the structure and authority of the California Constitution as to amount to a revision. Petitioners had argued that lifetime term limits would change the "basic governmental plan" in a radical manner with respect to legislative power, and that term limits were an assault upon the legislature as devastating as the assault on judicial power invalidated in *Raven*. The Court refused, however, to come to the aid of its coordinate branch of government. Proposition 140, the majority opinion held,

> does not affect either the structure or the foundational powers of the Legislature, which remains free to enact whatever laws it deems appropriate. The challenged measure alters neither the content of those laws nor the process by which they are adopted. No legislative power is diminished or delegated to other persons or agencies. The relationships between the three governmental branches, and their respective powers remain untouched. [Any allegations of diminished legislative power] are largely *speculative* ones, dependent on a number of as yet unproved premises.[83]

A large part of the reason Californians undertook the term limits initiative was their perception that the legislature—no less than the judiciary—was utterly recalcitrant on the issue of crime. Willie Brown had almost single-handedly defeated all attempts to enact tough crime measures during a time when crime rates were soaring. The Three Strikes initiative in 1994 brought the debate over direct democracy almost to a crisis point.[84] Three Strikes doubled sentences for second-time felons and imposed mandatory sentences of twenty-five years to life for a third felony. The novelty of the this statutory initiative was that, unlike the first and second felony strikes, which had to be serious or violent felonies, the third strike sentence enhancement was triggered by *any* felony. In addition, the initiative did not allow judges discretion in meting out sentences, and allowed the dismissal of a strike-eligible felony indictment only on the motion of the *prosecutor*. The latter provisions were inspired by the public's wide-spread belief that judges were a major cause of California's escalating crime rate because of their tendencies toward lenient sentences and their willingness to dismiss or reduce charges. Before the initiative was actually voted upon, the legislature also had a death-bed conversion and quickly passed Three Strikes legislation in substantially the same language as the initiative. (The legislature, however, has generally not received credit for passing Three Strikes, because it is conceded in almost all quarters that the pressure of the pending initiative forced it into passing legislation that it would never have otherwise considered).

Reaction to the initiative from legal commentators and criminologists was intense. The heirs of Progressivism had no qualms about expressing their utter disdain for public support of Three Strikes. Professor Michael Vitiello averred that "Three Strikes passed as a result of public panic, flamed [*sic*] by politicians who spurned rational debate." The inordinate fear of rising crime rates led to an irrational policy choice. Indeed, the passage of the Three Strikes initiative brings into question the very idea of direct democracy itself. "While many tout the initiative process as democracy in action," Vitiello cautions, "politicians' extravagant rhetoric prevented the electorate from making a fully informed decision on three strikes."[85] Franklin Zimring, a law professor at the University of California, is the most vehement critic of Three Strikes. [86] Three Strikes merely expresses a "populist" desire to punish criminals—it is the result of an irrational desire to mete out severe punishment to

recidivist criminals. This is a decision, Zimring alleges, that should be left to criminal justice experts, to those who are not motivated solely by what he calls "anti-offender" ire. "It may be," Zimring writes, "that the social authority accorded criminal justice experts provided insulation between populist sentiments (always punitive) and criminal justice policies at the legislative, administrative, and judicial levels. This insulation prevented the direct domination of policy by anti-offender sentiments that are consistently held by most citizens at most times.... Three Strikes was an extreme, but no means isolated, example of the kind of law produced when very little mediates anti-offender sentiments."[87] The public seemed to have the sense that anti-offender sentiments expressed in a law with mandatory sentencing would be the quickest and most efficient way to reduce crime—and they were right. Since it is well known that only a relatively small number of criminals commit a disproportionately large number of crimes, it is obvious that increased incarceration rates will reduce crime. Although Zimring and other criminal justice experts deny any cause and effect relationship, Three Strikes has had a prime role in the precipitous drop in the crime rate since 1994.[88]

The California Supreme Court weighed in on Three Strikes in *People v. Romero* in 1996.[89] Three Strikes allowed the dismissal of a prior felony conviction only on the motion of the prosecuting attorney, but prohibited judges from similarly striking prior felonies. Proponents of the initiative argued that this would limit the discretion of "soft-on-crime judges...[who] care more about violent felons than they do victims."[90] In *Romero*, the trial judge, Judge Mudd, on his own initiative, and in clear violation of the plain terms of Three Strikes, struck a prior felony over the objections of the prosecutor. This allowed the defendant to escape a mandatory third-strike sentence. Judge Mudd argued that the basis for his decision was the fact that "judges are the conscience of the community and should be free to evaluate what type of sanction is appropriate."[91]

The Court's decision in *Romero* did not reach the level of constitutional analysis, but resolved the issue on statutory grounds. Three Strikes had provided that "[t]he prosecuting attorney may move to dismiss or strike a prior felony conviction allegation in the furtherance of justice pursuant to Section 1385."[92] Section 1385 of the Penal Code had previously provided that "[t]he judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in the furtherance of justice, order an action to be dismissed."[93] The question was whether Three Strikes, in its attempt to curtail judicial discretion, had repealed Section 1385. The court concluded there was no clear intent on the part of the legislature to do so. And since there was no evident intent to repeal Section 1385, requiring that a dismissal in the furtherance of justice can take place only on the motion of the prosecutor is tantamount to conditioning the exercise of a judicial power on the actions of the prosecutor, a member of the executive branch. The court concluded that "the Legislature and the electorate may eliminate the courts' power to make certain sentencing choices may be conceded.... It does not follow, however, that having given the court the power to dismiss, the Legislature may therefore 'condition its exercise upon the approval of the district attorney.'"[94] Thus there are no constitutional barriers to repealing or modifying judicial discretion. Surprisingly, the Court held that the power to dismiss in the furtherance of justice is not an inherent or essential judicial power.

When the *Romero* decision was handed down, there was a flurry of activity in the Republican-dominated Assembly to overrule the holding by statutory means, but the effort came to naught because the Democrat-controlled Senate would simply have refused to acquiesce. The *Romero* decision, however, has probably helped insulate Three Strikes from attacks on federal due process grounds. Judicial discretion

will blunt arguments that allowing any felony to count as a third strike violates the proportionality requirement for punishment under the cruel and unusual punishment clause of the Eighth Amendment. This is surely one unintended consequence of *Romero*.[95]

Peter Schrag expresses what has come to be almost the consensus of those who oppose direct democracy and advocate the rule of experts: "the impulse toward cleaner government and a more perfect democracy in the Progressive movement was always a little hard to separate from the racist and xenophobic." "One essential part of the ethos of direct democracy," Schrag concludes, "almost inevitably reinforces an essentially indifferent, if not hostile attitude toward minority rights."[96] Indeed, one prominent legal scholar argues that majority rule (coupled with a secret ballot) is inherently racist and destructive of minority rights. In a widely cited article, Derrick Bell writes that "[f]ar from being the pure path to democracy...direct democracy, carried out in the privacy of the voting booth, has diminished the ability of minority groups to participate in the democratic process. Ironically, because it enables the voters' racial beliefs and fears to be recorded and tabulated in their pure form, the referendum has been a most effective facilitator of that bias, discrimination, and prejudice which has marred American democracy from its earliest day."[97] Almost the same point is made by those who argue that the Progressive movement was a middle-class phenomenon. This is a somewhat more genteel argument than the one put forth by Bell, but the point is essentially the same: "Progressive conceptions of 'the people' apparently excluded large sections of the electorate—workers, immigrants, Catholics, the urban and rural poor. As middle-class moral reformers, Progressives would seem to have fashioned a popular following in their own image."[98] The middle class is widely viewed as the "selfish class" because it seeks to promote its interests at the expense of other classes, and does so with an appeal to populism. The initiative is the perfect vehicle for these middle class forays against the welfare of minorities and of the poor.

Proposition 209, the constitutional amendment initiative repealing racial and sex preferences, provoked this debate in the most extreme terms. Racial preferences and set-asides represented the epitome of Progressivism for ideological liberals and the attempt to dismantle this government-inspired program was regarded by the minions of the administrative state as utterly reactionary—the use of populism for a retrograde purpose. Although Proposition 209 ultimately survived federal challenges, the Federal District Court opinion initially holding it unconstitutional was revealing for its explication of ideological liberalism.

In *Coalition for Economic Equity v. Wilson*,[99] Judge Thelton Henderson made a familiar argument: the prohibition against discrimination in Proposition 209 is itself discriminatory. By Judge Henderson's irrefragable logic, the Fourteenth Amendment's command that "No State...shall deny to any person...equal protection of the laws" is unconstitutional. The core of the argument seems to be that the refusal to allow the use of race, sex and ethnicity *is itself an impermissible use of race, ethnicity and sex.* Even though such an unnatural reading of the language of Proposition 209 defies any known principles of logic, Judge Henderson used this precise argument to demonstrate that the initiative was specifically aimed at minorities and women:

> [P]rior to the enactment of Proposition 209, supporters of race-and gender [*sic*]-conscious affirmative action programs were able to petition their state and local officials directly for such programs. After the passage of Proposition 209, however, these same advocates face the considerably more daunting task of mounting a statewide campaign to amend the California Constitution. At the same time, those seeking preferences based on any ground other than race or gender [*sic*], such as age,

> disability, or veteran status, continue to enjoy access to the political process of all levels of government.[100]

But Judge Henderson misses the point: disabled minorities and disabled women will have the *same* access as all disabled people; minority veterans and women veterans will have the same access as other veterans; the aged will be made up of all races and both sexes. The equal protection clause disallows—or certainly subjects to strict scrutiny[101]—access based exclusively on race or ethnicity, and mandates that all sex classifications serve important governmental interests. Judge Henderson is mistaken in thinking that the Constitution regards racial classes as no different than veterans, the disabled, or the aged.

In overruling Henderson's decision, the Ninth Circuit Court of Appeals, in an opinion by Judge O'Scannlain, argued that

> [p]laintiffs challenge Proposition 209 not as an impediment to protection against unequal treatment but as an impediment to receiving preferential treatment. The controlling words, we must remember, are equal and protection. Impediments to preferential treatment do not deny equal protection. It is one thing to say that individuals have equal protection rights against political obstructions to equal treatment; it is quite another to say that individuals have equal protection rights against political obstructions to preferential treatment. While the Constitution protects against obstructions to equal treatment, it erects obstructions to preferential treatment by its own terms. The alleged equal protection burden that Proposition 209 imposes on those who would seek race and gender [*sic*] preferences is a burden that the Constitution itself imposes.[102]

Perhaps the most tendentious argument made by Judge Henderson involved the locus of decision making. He argued that "[t]he body that enacts an affirmative action measure is free...to repeal it."[103] But, Judge Henderson added this inexplicable qualification: if "race and gender-conscious" preferences are to be repealed, they must be repealed by the same level of government that enacted them in the first place. "Once those who support race- and gender-conscious affirmative action prevail at one level of government ... the equal Protection Clause will not tolerate an effort by the vanquished parties to alter the rules of the game—solely with respect to this single issue—so as to secure a reversal of fortunes."[104] Thus we have something of a constitutional anomaly: an act of the legislature cannot be repealed by a constitutional amendment *nor* by a constitutional amendment initiative. Judge Henderson knows, of course, that special interest pleading is more likely to succeed in the legislature than in the public at large.[105] This is something that the Progressives understood as well, and Proposition 209 evidenced a better understanding of the public good and constitutional government than those who deliberated on the issue of racial and sex preferences in the legislature. It was the Democrat-dominated legislature under the leadership of Willie Brown that twice passed legislation mandating, not only racial and ethnic preferences for the University of California and California State University systems, but requirements of racial and ethnic *proportionality in graduation rates* as well. Governor Wilson vetoed all attempts to remake California society along the lines of ethnic and racial proportionality.[106] Judge Henderson concluded that much of the campaign rhetoric surrounding the election "had a racial and gender focus," indicating that "the measure was effectively drawn for racial purposes."[107]

Judge Henderson was correct, however, when he observed that "our system of democracy teaches that the will of the people, important as it is, does not reign absolute but must be kept in harmony with our Constitution. Thus, the issue is not whether one judge can thwart the will of the people; rather, the issue is whether the challenged enactment complies with our Constitution

and Bill of Rights."[108] Indeed, the framers of the Constitution regarded majority faction as the primary threat to the existence of republican government. James Madison wrote a few months before the opening of the Constitutional Convention that "[t]here is no maxim in my opinion which is more liable to be misapplied, and which therefore more needs elucidation than the current one that the interest of the majority is the political standard of right and wrong."[109] The majority acts legitimately only when it acts in accordance with those constitutional principles that form the organic law of the nation. That is, the majority, as a part, must act in the interest of the whole, not in the interest of a part, whether the part is a majority or a minority. The Constitution, in the famous words of Chief Justice John Marshall, is "the fundamental and paramount law of the nation which was established by the supreme will of the people and the principles ... so established, are deemed fundamental [and]...and designed to be permanent."[110] Any majority formed against the dictates of the fundamental and organic law is illegitimate, and it is the job of the courts to protect the Constitution against such transient majorities. But can any reasonable person doubt that Proposition 209 more accurately expresses constitutional principles than a regime of racial preferences and set-asides? Racial preferences are incompatible with the principle that all men are created equal and are thereby endowed with equal rights. The Fourteenth Amendment—rightly understood—mandates the equal protection of equal rights.[111] Judge Henderson and the advocates of racial and sex preferences—by and large policy experts one and all—to the contrary notwithstanding, the people of California expressed a superior understanding of the Constitution, the rule of law, and the public good.

Constitutions are designed to facilitate deliberation about the pubic good. In the main, the representative form of government works to promote such deliberation. Of course the real issue is not the form, but the substance, and the test is not the process but the result. A precise adherence to form is necessary to provide stability in government, but on those occasions when the legislature or other government officers refuse to acquiesce in the "cool and deliberate sense of the community," preferring to serve special interests at the expense of the common good, the people of California have the formal constitutional right "to alter or reform [Government] when the public good may require."[112]

The initiative is the constitutional vehicle for altering and reforming government; it occupies a middle ground between reform and revolution. Equal protection of equal rights—which has always been known as equal opportunity—has always been the principle of distributive justice for the United States and for California. The principle has not always been honored in practice, but the goal—the aspiration—has rarely ever been questioned. It has been the cool and deliberate sense of the community since the adoption of the Fourteenth Amendment, indeed since the founding of the nation. Proposition 209 restored that aspiration to its rightful place.[113] And who can doubt that the people of California were far ahead of the policymakers on the issue of bilingual education? Even the much maligned Proposition 187 provoked the Congress to pass a welfare reform bill in 1996, and could have forced the United States Supreme Court to reconsider its 1982 decision *Plyler v. Doe*,[114] which had created a right to education for illegal alien children (when, some years earlier, it had refused to recognize a fundamental right to education in the Constitution[115]). It is simply to confuse form with substance to argue that the initiative and referendum violate the Guaranty Clause or that the people are incapable of comprehending anything but appeals to passion and prejudice. The results must be judged by the standard of the public good; and by this standard the people of California have a better record than the partisans of ideological liberalism. Californians seem to have

rejected government by the minions of the administrative state—and this is, by all reckoning, a healthy sign for the future of republican government in California.[116]

NOTES

1. Letter to Edward Carrington (Jan. 16, 1787) *in* JEFFERSON: WRITINGS 880 (M. Peterson ed., 1984).

2. *First Inaugural Address, in* 4 COLLECTED WORKS OF ABRAHAM LINCOLN 268 (Roy P. Basler ed., 1953).

3. 2 THEODORE H. HITTELL, HISTORY OF CALIFORNIA 783 (1897). CARDINAL GOODWIN, THE ESTABLISHMENT OF STATE GOVERNMENT IN CALIFORNIA 1846-1850 at 242 (1914) reports that "[t]here are, excluding the article on the boundary, one hundred and thirty-six sections in the [1849] California constitution. Of these about seventy are taken from the constitution of Iowa and about twenty from that of New York. The other state constitutions, whose influence is discernible in the finished product of the Monterey Convention, are those of Louisiana, Wisconsin, Michigan, Texas, and Mississippi."

4. McCulloch v. Maryland, 4 Wheat. (17 U.S.) 315, 406 (1819).

5. CA. CONST. of 1879 Art. IX §6

6. *Id.*, Art. I § 25.

7. *Id.*, Art I § 26.

8. *Id.*, Art. I § 1.

9. KEVIN STARR, AMERICANS AND THE CALIFORNIA DREAM 1850-1915 at 68 (1973). Starr fails to distinguish between the pursuit of happiness and obtaining happiness. This leads him, quite mistakenly, to refer to the pursuit of happiness as the most compelling of American myths. *Id.* The pursuit of happiness is one of the natural rights that is an irrefragable conclusion from the fact that—to use the language of the Declaration of Independence—all men are created equal. Thus the right to the pursuit of happiness is not an American myth or any kind of myth. It is simply a principle of human nature which legitimate governments are instituted to secure. The Founders of America never confused the pursuit of happiness (which can be guaranteed) with the securing of happiness (which cannot).

10. CA. CONST. of 1849 Art. I § 2.

11. HITTELL, *supra* note 3, at 784.

12. 4 *id.* at 639-40.

13. *Id.*

14. *Id.* at 638-39.

15. GEORGE MOWRY, THE CALIFORNIA PROGRESSIVES 9, 13, 90, 117 (1951).

16. *A Debate on Initiative and Referendum: Haynes in Favor; Adams Opposed*, a debate held on October 11, 1911 at the Commonwealth Club of San Francisco, *in* CALIFORNIA CONTROVERSIES 95 (Leonard Pitt ed., 1985).

17. Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1, 17-18 (1978).

18. PETER SCHRAG, PARADISE LOST 189 (1998).

19. *Id.* at 265, 187.

20. *Id.* at 275.

21. *Id.* at 201.

22. John Ferejohn, *Reforming the Initiative Process, in* CONSTITUTIONAL REFORM IN CALIFORNIA 318 (Bruce E. Cain and Roger G. Noll eds., 1995).

23. Mathew D. McCubbins, *Putting the State Back into State Government: The Constitution and the Budget, in id.* at 358.

24. Hans A. Linde, *When Initiative Lawmaking is Not Republican Government: The Campaign Against Homosexuality*, 72 OR. L. REV. 19, 34 (1993).

25. THE FEDERALIST No. 39, at 209 (James Madison) (Clinton Rossiter and Charles Kesler eds., 1999).

26. *Id.* No. 63, at 355 (emphasis in original).

27. *Id.* No. 10, at 49.

28. *Id.* No. 14, at 68.

29. *Id.* No. 10, at 50.

30. *Id.* No. 49, at 285.

31. *Id.* No. 10, at 52.

32. *Id.* No. 51, at 290.

33. *See* EDWARD J. ERLER: THE AMERICAN POLITY: ESSAYS ON THE THEORY AND PRACTICE OF CONSTITUTIONAL GOVERNMENT 39-57 (1991).

34. FEDERALIST NO. 63, *supra* note 25, at 352. Notice also the similar statement by Alexander Hamilton in No. 71, at 400-01.

35. WILLIAM M. WIECEK, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION 62 (1972).

36. During the "Petition Crisis" of the late 1830s, many Americans rested their opposition to slavery on precisely this basis. Americans sent hundreds of petitions to Congress demanding, for instance, that Congress refuse to admit Texas into the union, because, as a slave state, it could not be admitted consistent with the Guaranty Clause. *See generally* WILLIAM LEE MILLER, ARGUING ABOUT SLAVERY (1998).

37. WIECEK, *supra* note 35 at 62-3.

38. FEDERALIST NO. 10, *supra* note 25, at 45.

39. *Id.* at 51.

40. Hans Linde, *Guaranteeing a Republican Form of Government: Who Is Responsible for Republican Government?* 65 U. COLO. L. REV. 709, 710 (1994).

41. SHRAG, *supra* note 18 at 195, 177, 224, 254.

42. Bruce E. Cain, et. al., *Constitutional Change: Is It Too Easy to Amend Our State Constitution? in* CAIN AND NOLL, *supra* note 22 at 288-89.

43. California Democratic Party v. Jones, 530 U.S. 567, 576 (2000). The classic example of the U.S. Supreme Court invalidating a California constitutional amendment initiative on federal grounds is Reitman v. Mulkey, 387 U.S. 369 (1967), which struck down Proposition 14, a property

rights initiative, as a violation of equal protection because it put the constitutional authority of the state behind potential racial discrimination.

44. 22 Cal. 3d 208 (1978).

45. *Id.* at 219 (citations omitted).

46. Craig B. Holman and Robert Stern, *Judicial Review of Ballot Initiatives: The Changing Role of State and Federal Courts,* 31 Loy. L.A. L. Rev. 1239, 1251 (1998).

47. Most recently in Senate of the State of California v. Jones, 21 Cal. 4th 1142 (1999), the California Supreme Court held that Proposition 24 could not appear on the March 2000 ballot because it violated the California Constitution's single-subject rule. The proposition addressed two issues: reapportionment and compensation for state legislators and other state officers. The court ruled that these provisions were not reasonably germane to a single subject as is required by Art. II, 8(d).

48. *See* Luther v. Borden, 7 How. (48 U.S.) 1 (1849). In Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1911), the Court specifically applied *Luther* in the context of initiative and referendum measures.

49. 369 U.S. 186 (1962).

50. 377 U.S 533 (1964).

51. *See* Debra F. Salz, Note: *Discrimination-Prone Initiatives and the Guarantee Clause: A Role for the Supreme Court*, 62 Geo. Wash. L. Rev. 100 (1993).

52. Linde, *Initiative Lawmaking, supra* note 24 at 39-40.

53. *Id.* at 40.

54. *Id.* at 44.

55. *Id.* at 41-43.

56. *See* Cain, et. al., *Constitutional Change*, *supra* note 42 at 265.

57. *Id.* at 269.

58. *See further* Clint Bolick, Grassroots Tyranny (1993).

59. Ferejohn, *Reforming the Initiative Process*, *supra* note 22 at 354.

60. Alan Rosenthal, The Decline of Representative Democracy 34 (1998).

61. Holman and Stern, *supra* note 46 at 1249.

62. Joseph R. Grodin, *The Role of State Constitutions in a Federal System, in* Cain and Noll, *supra* note 22 at 32.

63. William J. Brennan, *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. Rev. 550 (1986).

64. 423 U.S. 96 (1975).

65. *Id.* at 120-121 (Brennan, J., dissenting).

66. Stanley Mosk, *State Constitutionalism: Both Liberal and Conservative*, 63 Tex. L. Rev. 1093, 1087-88 (1985). The title of this article is misleading. Mosk argues that conservatives should support state constitutionalism because it represents the triumph of federalism. Conservatives would be hard pressed, however, to see such judicial activism—with its disregard for originalism—as an appropriate expression of federalism, however federalism might be understood. *See* Edward J. Erler, *Independence and Activism: Ratcheting Rights in the State Courts*, 4 Benchmark 55-66 (1988).

67. People v. Teresinski, 30 Cal.3d 822, 836 (1982).

68. 6 Cal.3d 628 (1972).

69. *Id.* at 656.

70. 25 Cal.3d 142 (1979).

71. *Id.* at 172

72. *Id.* at 185 (emphasis in original).

73. *Id.* at 186.

74. 37 Cal.3d 873 (1985).

75. Raven v. Deukmejian, 52 Cal.3d 336 (1990).

76. *Id.* at 352.

77. *Id.* at 353 (emphasis in original).

78. *Id.* at 354.

79. *Id.* at 355.

80. Legislature of the State of California v. Eu, 54 Cal. 3d 492 (1991).

81. Shrag, *supra* note 18 at 242. It is a singular—although perfectly intelligible—fact that not one state without the initiative process has adopted term limits.

82. Willie Brown's reputation as an astute Sacramento politician is legendary. One well-known and oft-repeated story has Willie Brown dealing with insurance industry representatives and trial lawyers at a famous Sacramento watering hole. The episode is recounted by Holman and Stern, *supra* note 46 at 1248: "In the late 1980s, Assembly Speaker Willie Brown sat down at Frank Fat's restaurant in Sacramento with insurance industry lobbyists and trial lawyers. He negotiated an agreement, written on a cocktail napkin, in which the insurance industry obtained an insurance law with no controls on prices and the trial lawyers were rewarded with no control on lawyers' fees and damage awards. All interests were considered except those of California's consumers, who subsequently revolted and rewrote the state's insurance policy by initiative and placed controls on insurance costs." The cocktail napkin in question was subsequently framed and currently hangs on the wall at Frank Fat's restaurant.

83. *Eu, supra* note 80 at 509 (emphasis in original). Many have argued that term limits was unnecessary because the democratic process allowed the voters to turn any politician out of office. This argument ignores, however, the extent to which reapportionment politics in the legislature allows politicians to select voters and thereby ensure incumbency.

84. Cal. Penal Code § 667 (West 2001).

85. Michael Vitiello, *Three Strikes and the Romero Case: The Supreme Court Restores Democracy*, 30 Loy. L.A. L. Rev. 1643, 1652 (1997).

86. Franklin E. Zimring, *Populism, Democratic Government, and the Decline of Expert Authority: Some Reflections on Three Strikes in California*, 28 Pac. L. J. 243 (1996).

87. *Id.* at 255.

88. *See* Brian P. Janiskee and Edward J. Erler, *Crime, Punishment and* Romero*: An Analysis of the Case Against California's Three Strikes Law*, 39 DUQ. L. REV. 43 (Fall 2000), where much of the following discussion is developed.

89. People v. Superior Court ("*Romero*") 13 Cal. 4th 497 (1996).

90. Ballot Pamp. rebuttal to the argument against Proposition 184, as presented to the voters, Gen. Elec. (Nov. 8, 1994).

91. Vitiello, *supra* note 85, at 1649 n.21.

92. Cal. Penal Code 667(f)(2) (West 2001).

93. Cal. Penal Code 1385(a) (West 2001).

94.. *Romero*, 13 Cal. 4th at 528 (*quoting* People v. Navarro, 7 Cal.3d, 248, 260 (1972)).

95 *See* Janiskee and Erler, *supra* note 88 for an in-depth discussion of the due process issue.

96. SCHRAG, *supra* note 18 at 243, 269. This theme is pervasive in Schrag's account; *see id.* at 22, 61, 224, 225.

97. Bell, *supra* note 16 at 14-15.

98. MICHAEL P. ROGIN AND JOHN SHOVER, POLITICAL CHANGE IN CALIFORNIA: CRITICAL ELECTIONS AND SOCIAL MOVEMENTS 1890-1966 at 36 (1970).

99. 946 F. Supp. 1480 (N.D. Cal. 1996) ("*Wilson I*").

100. *Id.* at 1499. *Cf.* Romer v. Evans, 517 U.S. 620 (1996).

101. *See* Adarand Constructors v. Pena, 515 U.S. 200 (1995).

102. Coalition for Economic Equity v. Wilson, 122 F.3d 692, 708 (9th Cir. 1997) ("*Wilson II*").

103. *Wilson I*, 946 F.Supp. at 1510.

104. *Id.*

105. *See further* JAMES BUCHANAN AND GORDON TULLOCK, THE CALCULUS OF CONSENT (1962).

106. MOWRY, *supra* note 15 at 235.

107. *Wilson I*, 946 F. Supp at 1506.

108. *Id.* at 1490.

109. Letter from James Madison to James Monroe (Oct 5, 1786), *in* 9 PAPERS OF JAMES MADISON 142 (1962).

110. Marbury v. Madison, 1 Cranch (5 U.S.) 137, 176 (1803).

111. *See* Edward J. Erler, *The Future of Civil Rights: Affirmative Action Redivivus*, 11 NOTRE DAME J. LAW & PUB. POLY 31 (1997); ERLER, *supra* note 33 at 91-122.

112. CA. CONST. Art. II § 1 (West 2001).

113. A month after the conference at which this paper was delivered, the California Supreme Court held precisely that. By adopting Proposition 209, the Court held, "the electorate desired to restore the force of constitutional law to the principle articulated by President Carter on Law Day 1979: 'Basing present discrimination on past discrimination is obviously not right.'" Hi-Voltage Wire Works, Inc. v. City of San Jose, 24 Cal. 4th 537, 562 (2000).

114. 457 U.S. 202 (1982)

115. San Antonio Independent Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973). *See also* Edward J. Erler, *Immigration and Citizenship, in* LOYALTY MISPLACED: MISDIRECTED VIRTUE AND SOCIAL DISINTEGRATION 83-86 (Gerald Frost ed., 1997).

116. Professor Harry V. Jaffa told me that my analysis of the California Constitution reminded him of Lord Macaulay's account of the Toleration Act of 1689. In his magisterial *History of England* Macaulay wrote that

> [t]o a jurist, versed in the theory of legislation, but not intimately acquainted with the temper of sects and parties into which the nation was divided at the time of the Revolution, that Act would seem to be a mere chaos of absurdities and contradictions. It will not bear to be tried by sound general principles. Nay, it will not bear to be tried by any principle, sound or unsound. The sound principle undoubtedly is, that mere theological error ought not to be punished by the civil magistrate. This principle the Toleration Act not only does not recognize, but positively disclaims. Not a single one of the cruel laws enacted against nonconformists by the Tudors or the Stuarts is repealed. Persecution continues to be the general rule. Toleration is the exception....But these very faults may perhaps appear to be merits, when we take into consideration the passions and prejudices of those for whom the Toleration Act was framed. This law, abounding with contradictions which every smatterer in political philosophy can detect, did what a law framed by the utmost skill of the greatest masters of political philosophy might have failed to do. That the provisions...are cumbrous, puerile, inconsistent with each other, inconsistent with the true theory of religious liberty, must be acknowledged. All that can be said in their defence is this; that they removed a vast mass of evil without shocking a vast mass of prejudice.... Such a defence, however weak it may appear to some shallow speculators, will probably be thought complete by statesmen.

2 LORD MACAULAY, HISTORY OF ENGLAND 465-466 (1967). *See* HARRY V. JAFFA, A NEW BIRTH OF FREEDOM: ABRAHAM LINCOLN AND THE COMING OF THE CIVIL WAR 126 (2000).